

**Before the
RURAL UTILITIES SERVICE
DEPARTMENT OF AGRICULTURE
Washington, D.C. 20250**

In the Matter of)
)
Launching Our Communities' Access)
To Local Television Act of 2000)
)
Notice of Inquiry)

**COMMENTS OF THE NATIONAL CABLE
& TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association ("NCTA") hereby submits its supplemental comments in response to the Notice of Inquiry ("Notice") issued by the Rural Utilities Service ("RUS").¹ NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television operators, programmers, and others affiliated with the cable industry. NCTA previously filed comments in response to the RUS's Notice issued last year. A copy of our comments is attached.

DISCUSSION

The RUS seeks additional information on developments in the communications industry that may affect its efforts to implement the provisions of the "Launching Our Communities' Access to Local Television Act of 2000," P.L. 106-553, 47 U.S.C. §1101-1109 (the "Act"). Among other things, the RUS seeks comments on "recent changes in the industry that could affect the delivery of local TV signals to households located in nonserved areas and underserved areas," especially in light of the proposed combination of EchoStar and DirecTV.²

¹ 67 Fed. Reg. 21216 (Apr. 30, 2002) (hereinafter "Notice").

² Id.

The Notice states that if this merger occurs, the companies will offer local broadcast signals to all 210 television markets.³ As we said in our initial comments, satellite providers with national footprints are the types of entities most likely to attract the necessary capital to serve rural America without government assistance. Any funding under this program should be used to encourage those entities most in need of capital to provide service to any nonserved and underserved communities,⁴ according to the priorities set forth in the Act.

The Notice also asks about emerging technologies that may be capable of providing local television signals. In particular, it requests information about “technologies that would be the most cost effective method of delivering local TV signals to the largest number of nonserved and underserved rural residences not located in the top 40 designated market areas...”⁵ Recent developments do not change the core purpose of the loan program: to “facilitate access, on a *technologically neutral basis* and by December 31, 2006, to signals of local television stations for households located in nonserved areas and underserved areas.”⁶ Whether a particular technology – new or old – may be more or less “cost effective” in the abstract should be irrelevant to the establishment of regulations implementing the Act.

Congress directed the RUS to “give priority to those *projects* that provide the highest quality service at the lowest cost per household.”⁷ The Notice provides no basis for the RUS to stray from the specific language and fundamental intent of the Act. For the reasons stated in our

³ Recent studies have concluded that *even absent a merger*, each company is capable of providing service to all local television markets. DBS Industry Update, SolomanSmithBarney, January 17, 2002 at 21-22.

⁴ See Act, Section 1004(d)(3)(iv) (requiring that prior to approval of loan guarantees, the Board be given documentation to show that the “loan would not be available on reasonable terms and conditions without a loan guarantee under this Act”).

⁵ Notice, 67 Fed. Reg. at 21216.

⁶ Act, § 1002 (emphasis supplied.)

⁷ Id., § 1004(e).

earlier comments, cable operators should be fully able to participate in the loan program on an equal footing with other technologies. Qualifications for the loan should be judged on the relative merits of the project proposed, not on the technology that proposes to provide service.

Respectfully submitted,

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on the characteristics of specific projects, not on the characteristics of the particular technology that an applicant proposes to utilize; (ii) properly prioritizes projects, with first consideration given to those projects addressing the needs of “nonserved” areas; and, (iii) minimizes the administrative burdens associated with the loan guarantee process so that a wide range of applicants, including smaller, “Main Street” businesses, are given a fair opportunity to develop projects to extend local broadcast signal availability in their own communities.

DISCUSSION

I. The RUS Should Adhere to the Statutory Goal of Technological Neutrality by Designing an Application and Evaluation Process That Focuses on Whether a Proposed Project Meets the Prerequisites and Criteria Specified in the Act, Not on the Particular Technology That the Applicant Proposes to Employ.

The central feature of the federal loan guarantee program established by the Act is that it must be administered on a technologically neutral basis. In other words, each loan application must be judged based on the merits of the project proposed, not on the perceived advantages or disadvantages of one technology relative to another. Any company using any technology – wired, wireless, or satellite – must be given the opportunity to submit an application and to make the case that it is capable of providing high quality access to local television in a cost-effective manner. As Dale Hatfield, then Chief of the FCC’s Office of Engineering and Technology, testified during hearings on the Act, there are a variety of providers using a variety of technological options available for delivery of television signals to nonserved and underserved areas, including cable television operators, satellite providers, local telephone companies, terrestrial wireless

systems, and TV translators.² In particular, we note that cable television systems currently provide approximately 97 percent of the 102 million television households in the country with access to local broadcast signals.³

The availability of guaranteed loans could make it possible for cable companies to extend their fiber or coaxial cable facilities to reach low-density areas that they currently are not obligated to serve, and that are otherwise uneconomical to serve. These are typically areas with fewer than 10-12 homes per mile. Alternatively, some of these companies could determine that combining their wired technology with other technologies, perhaps wireless or satellite-based, may be the most cost-effective way to achieve the goals of the program. In any event, it is crucial that providers of all technologies, including cable companies, have an opportunity to participate in the loan guarantee program.

NCTA is somewhat concerned by the fact that a number of the specific questions raised in the Request for Information focus on the characteristics and relative merits of particular technologies. For example, the Request for Information asks commenters not merely to identify which technologies are capable of providing high quality access to local television, but also to discuss the financial, operational, and technological advantages and disadvantages of each (including the specific issue of the availability and cost of sufficient spectrum for wireless systems). The Request also seeks information as to what technology or combination of technologies would be the most cost-effective

² Statement of Dale N. Hatfield, Chief, Office of Engineering & Technology, FCC, for Hearing on "Loan Guarantees and Rural Television Service," before the Committee on Banking, Housing and Urban Affairs, U.S. Senate, February 1, 2000 at 4-9.

³ In accordance with the "retransmission consent" and "must carry" provisions of the Communications Act and the FCC's rules, these cable companies effectively are required to carry a full complement of local broadcast signals wherever they are built. See 47 U.S.C. § 614, 615; 47 C.F.R. § 76, Subpart D (must carry and retransmission consent rules).

method of delivering local TV signals to the largest number of nonserved and underserved areas outside the top 40 designated market areas.

Congress did not intend, however, for the RUS to use the statutorily-mandated rulemaking to predetermine which particular technology (or combination of technologies) is best equipped to provide rural areas with expanded access to local television signals. Rather, the RUS should use the rulemaking process to establish an application process that is designed to elicit from each applicant information about the proposed project for which a loan is sought, so that the eligibility and qualifications of the proposed project, not the technology being employed, can be fully assessed.

For example, the Act provides that guaranteed loan funds can only be used to finance the acquisition, improvement, enhancement, construction, deployment, launch or rehabilitation of the means by which local broadcast signals are delivered to nonserved or underserved areas and that the proceeds of the loan may not be used for various other purposes, including operations, advertising, promotion, or for use in a spectrum auction.⁴ The Act also requires that the loan be provided by a qualified entity as described in Section 1004(d)(2)(D) and prohibits loans for projects that are designed “primarily” to serve households in one or more of the top 40 designated market areas or that will remove or alter National Weather Service warning.⁵ Any draft rules proposed by the RUS⁶ should provide applicants with guidance as to what types of information, including cost estimates, budget plans, etc. must be submitted to demonstrate compliance with these loan guarantee prerequisites.

⁴ See Act, Section 1004(d)(2)(A) and (B).

⁵ See Act, Section 1005(e)(1)(C).

⁶ It is our understanding that this Request for Information is a prelude to a Notice of Proposed Rulemaking, at which time interested parties will have the opportunity to comment on specific proposals.

Last, but by no means least, the RUS should endeavor to describe in its draft rules how it intends to apply the 80 percent guarantee limitation in Section 1004(f)(2) of the Act. Section 1004(f)(2) provides that a loan guarantee issued under the Act may not exceed an amount equal to 80 percent of the “applicable portion” of the loan under subsection (d)(2)(A) – the portion of the loan needed to cover the costs of constructing, launching, etc. the means for delivering local signals to nonserved or underserved areas. The rules adopted by the RUS need to give loan guarantee applicants guidance as to how the “applicable portion” of their loans will be calculated.⁷

II. The RUS’ Draft Rules Should Provide Guidance to Applicants Regarding Application of the Priorities and Criteria Employed in Evaluating Loan Guarantee Requests.

In addition to setting certain prerequisite conditions for granting a loan guarantee (*e.g.*, the project to which the loan pertains must be for an eligible purpose, must not have an adverse impact on competition, and must be issued by an eligible lender) and limiting the amount of the project to which the guarantee may apply (*i.e.*, 80 percent of the “applicable portion”), the Act establishes a set of “priorities” and other “considerations” for use in evaluating loan guarantee applications. The RUS should adopt specific rules designed to give applicants guidance with respect to how these priorities and other considerations will be employed. As noted above, these rules must be technology neutral; that is, just as the rules may not prejudge a project’s eligibility for a loan guarantee based on the technology to be employed, the rules also must not prioritize or otherwise give credit to a project for meeting certain considerations simply based on the

⁷NCTA submits, for example, that where a project would be used to provide local broadcast signals to “served” areas as well as to “nonserved” and “underserved” areas (or to nonserved or underserved households in the top 40 markets), the RUS should calculate the “applicable portion” of a loan by reducing the cost of the project by an amount proportionate to the number of ineligible households that will receive service. Additionally, the applicable portion should not include any direct costs incurred in providing services other than local signals.

technology utilized. Furthermore, the rules should provide guidance as to what information an applicant must submit in order to demonstrate that its project satisfies the priority conditions or other considerations spelled out in the Act.

In particular, the statutory language expresses Congress' clear intent to give the highest priority to projects that reach *nonserved areas* – areas that are outside the Grade B contour of the local television broadcast signals serving a particular designated market area and that do not have access to such signals from any commercial, for-profit multichannel video provider.⁸ Projects that serve “underserved” areas – areas that are outside the Grade A contour of the local market broadcast signals and that are served by no more than one multichannel video provider – represent the next tier of projects in terms of priority.⁹ And within each of these “priority” groupings, the statute requires (i) that equal consideration be given to projects proposing to extend local television signals to remote, isolated communities in areas that are unlikely to be served through marketplace mechanisms as to those projects that will serve the largest number of households and (ii) that priority be given to projects that provide the “highest quality service at the lowest cost per household.”¹⁰

The application and evaluation process adopted by the RUS not only should embody the priorities described above, it also should specify what factual showings an applicant will have to make in order to demonstrate its entitlement to a particular level of priority. In addition, the rules also need to spell out how an applicant should document the standing of its proposal with respect to the “other” and “additional” considerations –

⁸ See Act, Section 1004(e)(1)(A)(i).

⁹ See Act, Section 1004(e)(1)(A)(ii).

¹⁰ *Id.*

such as whether the project would serve households not likely to be served in the absence of a loan guarantee – that Congress essentially has provided for use as “tiebreakers” in choosing between projects that are otherwise equal in priority.¹¹

III. The RUS Should Minimize the Administrative Burdens Associated with the Application Process.

While it is important that the application process elicit sufficient information to establish the eligibility of applicants and to quantify the “applicable portion” of the loan as well as information necessary to prioritize the loan application, it also is important that the burdens of the process not deter small “Main Street” businesses from applying. The local, small businesses that often are the economic heart of nonserved and underserved rural areas should not find themselves foreclosed from the opportunities offered by the Act, particularly by paperwork and other administrative burdens that do not directly benefit the consumers in these areas.

It was never Congress’ intent that only large, well-heeled organizations obtain the loan guarantees provided for by the Act. Indeed, satellite services with nationwide footprints and other similar national providers are the types of entities that are most likely to attract the necessary capital to provide service to rural America without government assistance. The RUS’ rules should be designed to encourage, not discourage, smaller entities to develop projects that will offer solutions to the availability of local broadcast stations in nonserved and underserved communities.

In particular, the application process developed by the RUS should include clear, reasonable deadlines. Reasonable time should be given following the adoption of rules,

¹¹ See Act, Section 1004(3). See also Act, Section 1004(e)(2) (“other considerations” for evaluating loans include whether the project will offer a separate tier of local broadcast signals (but for applicable Federal, State, or local laws and regulations), will provide lower projected costs to consumers of such separate tier, and will enable the delivery of local broadcast signals by a means reasonably compatible with existing systems or devices predominantly in use.)

but before these deadlines, to enable all parties to become familiar with the process. The loan application process should not be a race that effectively forecloses participation by entities unfamiliar with federally-supervised programs such as this.

CONCLUSION

Congress was clear that loan guarantees should be used for those projects that are best able to facilitate access to local broadcast television signals in a cost-effective manner without regard to the technology employed and with the primary goal being to reach the largest number of nonserved homes, including homes in remote, isolated communities. The rulemaking process that the Act directs RUS to undertake should have as its goal the implementation of an application and evaluation process that is consistent with these statutory objectives. NCTA looks forward to participating in this process.

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